UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
THIRD REGION

Paul Smith's College
of Arts and Sciences [1]

Employer

and **Case 3-RC-11685**

United Food & Commercial
Workers, District Union Local One [2]

Petitioner

DECISION AND DIRECTION OF ELECTION

United Food & Commercial Workers, District Union Local One (the Union) filed a petition under Section 9(c) of the National Labor Relations Act, as amended. A hearing was held before a hearing officer of the National Labor Relations Board. Pursuant to Section 9(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned. Upon the entire record in this proceeding, including the post-hearing briefs filed by both parties, I find as follows.

The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

This case solely involves the issue of the supervisory status of head custodian Michael Newtown. Paul Smith's College of Arts and Sciences (the Employer) takes the position that Newtown is and has been, since February 2002, a statutory supervisor. The Petitioner argues

[1] The name of the Employer appears as amended at the hearing.
[2] The name of the Petitioner appears as amended at the hearing.

that Newtown is now, and has for some time been, a non-supervisory employee. Petitioner asserts in its brief that, "to the extent that Mr. Newtown once possessed supervisory powers, he no longer does so." Petitioner contends that, over a period of time, Newtown has been divested of all supervisory authority.

The evidence is clear that Newtown possessed and exercised supervisory authority, including the authority to assign and responsibly direct the work of custodians, to discipline employees and to effectively recommend hiring. However, based on the record evidence, I am unable to determine whether, since June 2005, Newtown has continued to possess any supervisory authority.[3] Therefore, Newtown shall be eligible to vote in the election directed herein, subject to challenge.

The parties stipulated that the Employer is a New York not-for-profit corporation engaged in the operation of an institution of higher learning, with its campus located in Paul Smith's, New York. During the 12-month period preceding February 23, 2006, the Employer, in conducting its business operations, derived gross revenues in excess of $ 1,000,000 and, during the same period, purchased and received at its Paul Smith's, New York campus, goods and services valued in excess of $50,000, directly from points located outside the State of New York. Based on the parties' stipulation and the record as a whole, I find that the Employer is engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

The parties stipulated, and I find, that the Petitioner is a labor organization within the meaning of Section 2(5) of the Act.

A question affecting commerce, within the meaning of Sections 2(6) and (7) and 9(c)(1), exists concerning the representation of certain employees of the Employer.

[3] As explained below, I find that the record does not establish that Newton has the supervisory authority to reward employees by completing evaluations that directly affect wage increases.

The petitioned-for unit included all full-time and regular part-time facilities department employees employed at the Employer's Paul Smith's New York campus, but excluded all office clericals, guards, campus safety employees, professional employees and supervisors, and all other employees. At the hearing, the parties stipulated that an appropriate unit consists of:

> All full-time and regular part-time facilities department employees employed by the Employer at its Paul Smith's, New York campus, excluding office clerical employees, campus safety employees, Vice President Facilities and Lands, Facilities Managers, administrative assistants, utilities managers, guards and professional employees and supervisors as defined in the Act, and all other employees.

I find the stipulated unit (herein referred to as the Unit) to be an appropriate unit for the purposes of collective bargaining. There are approximately 12 to 14 employees in the Unit found appropriate herein.[4]

The Employer is a four-year college located on 12,000 acres of forest land near Saranac Lake, New York.[5] The campus physical plant consists of approximately 20 buildings. Several building construction projects are either contemplated or in progress.

Steven McFarland has been the Employer's Vice President for Facilities and Lands for approximately nine years. McFarland testified that the facilities department positions under his supervision are an administrative assistant (Susan Streiff), a utilities manager (Jane Manderville), a facilities manager (Carl Dunn), the head custodian (Michael Newtown), and 11 custodians.[6] Custodians clean residence halls and the common areas of these and other buildings, in addition to performing other duties from time to time.[7]

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[4] The parties stipulated that there are approximately 14 employees in the Unit. (Board's Exhibit 2) McFarland testified that there are "a head custodian and eleven custodians" and a current list of employees, (Employer's Exhibit 8), is consistent with McFarland's testimony.

[5] The college manages the forest land.

[6] Raymond Parent, who is listed as a maintenance employee on Employer's Exhibit 8, is apparently counted as a custodian.

[7] These other duties include, for example, snow removal or setting up and taking down school events.

McFarland and Newtown testified at the hearing, for the Employer and the Petitioner, respectively. There were no other witnesses presented.

In about February 2002, the incumbent facilities manager resigned on short notice. In order to meet the Employer's need for day-to-day supervision of the custodian staff, the position of housekeeping supervisor was created.[8] Newtown, who had been a custodian since 1994, was promoted to the position. Upon his promotion to head custodian, Newtown's hourly wage was set at $12.00, an increase of $2.00 per hour. At present, Newtown's hourly wage is $17.15. The hourly wages of custodians hired within the past four years range from $8.00 to $10.82. Maintenance employee Raymond Parent earns $12.36 per hour. Custodian Steven Martin, who was hired in 1992, earns $12.88 per hour. Newtown has the same benefits as the custodians. The position of facilities manager remained vacant until Carl Dunn assumed the position on January 17, 2006. Currently, Newtown reports to Dunn, who in turn reports to McFarland.

The Employer, in its brief, asserts that Newtown is a supervisor based on his authority, or his ability to make effective recommendations, concerning discipline and discharges, assignment and responsible direction of work, hiring, and rewarding employees.

Authority to discipline and discharge

McFarland testified that Newtown has the authority to respond to performance or disciplinary problems by issuing employee warning notices. Newtown has issued approximately 25 such notices during his tenure as head custodian, but only 12, dated between October 2002 and December 2005, are in evidence. Each of these are signed by Newtown as "supervisor." The sections marked "nature of infraction" (e.g., insubordination, refusal to follow procedures) were

[8] The position title was changed to "head custodian" the following year. McFarland testified that the duties of the position remained the same.

completed by Newtown with check marks and Newtown's narrative comments also appear on the forms. McFarland testified that those documents containing his signature were signed by him as a witness. McFarland's signature appears above the line stating "witness to warning." On some of these documents, McFarland also added handwritten comments and/or a note indicating the discipline to be imposed.

The documentary evidence clearly establishes that Newtown issued a warning notice recommending the termination of employee Gary Davis in July 2003, and that he issued a warning to employee Kevin Sansone in March 2004, for substandard work.[9] Newtown also clearly exercised disciplinary authority in June 2005, when he issued warnings to employees James Tuper and Kelly Baldwin. Newtown testified that he had the authority to write up employees in June 2005.

Newtown also testified, however, that in September or October 2005, McFarland told him that he would no longer be responsible for disciplining employees.[10] However, a warning notice to employee Luke Saumier was prepared by Newtown on November 15, 2005, and a warning notice to Eric Covey was prepared by Newtown on December 1, 2005. Both warnings were issued after Newtown's responsibilities in this area were, by his account, taken away.

McFarland was not asked at the hearing about the Saumier warning at all, nor was he asked about the circumstances surrounding the December 2005 warning to Covey, or

[9] There are four handwritten pages of notes attached to Sansone's warning, describing the work Newtown found to be substandard. A page of typed notes, setting forth the reasons that Newtown recommended Davis' termination, is attached to Davis' warning. McFarland testified that Davis is no longer employed, but he could not recall whether Davis was terminated as a result of the warning.

[10] There is no evidence in the record as to why this responsibility, or any other responsibilities, were taken away from Newtown. Nor is there any evidence as to who else may have carried them out. Newtown testified that he assumed, but did not know, that it was utilities manager Jane Manderville. McFarland was not recalled in rebuttal of this, or any other testimony. However, while Newtown's testimony is in some respects unrebutted, it also raises questions unanswered by the record evidence and his testimony is internally inconsistent. The Employer argues that I should discredit Newtown as a witness. Unlike an administrative law judge in an unfair labor practice case, or a hearing officer in a post-election proceeding on challenges or objections, I do not make credibility determinations in representation matters. Representation hearings are non-adversarial and I decide the issues on the basis of the sufficiency of the evidence.

Newtown's role in the discipline. The Saumier warning, written and signed by Newtown as "supervisor," states that Newtown:

> …found the condition of Mr. Saumier's assigned buildings
> to be far below the conditions of which he was trained to do.
> This substandard work must stop…

The Covey warning, also written and signed by Newtown as "supervisor," states that Covey failed to clean an area as instructed. As a result of what Newtown wrote was Covey's "lack of responsibility," Newtown, McFarland and others had to rush to prepare the area for an event. Regarding the incident, Newtown testified that he:

> …did not even find this work to be substandard, Mr. Mc Farland,
> himself, found it and then instructed me to write up Mr. Covey.
> "I want this man written up" is the exact words I was told.

With respect to both the Saumier and Covey warnings, Newtown testified without contradiction that he was ordered to write them up by McFarland. Except for Newtown's testimony that McFarland was "adamant" that Covey be written up, there was no testimony about the conversation(s) wherein Newtown was so ordered. It is unclear from the record why, if Covey's work was not, in Newtown's opinion, substandard, it was necessary for McFarland, Newton, and others to clean the area in a rush, in order to prepare for an event. Covey was ultimately discharged in February 2006.

There is no documentary evidence in the record regarding Covey's discharge. McFarland testified that he terminated Covey on February 8, with the involvement of facilities manager Carl Dunn, who discovered the misconduct. McFarland also testified that Newtown was not involved in the incident. Initially, McFarland testified that Newtown was on medical leave on February 8, but he later corrected his testimony. McFarland then testified that he could not say when

Newtown began his leave (which continued through the date of the hearing). Newtown testified that his last day of work before going on leave was February 9, which suggests that he was at work on the day that Covey was terminated. McFarland testified that he saw no need to involve Newtown in the termination because there was already a history of warnings given to Covey by Newtown.[11]

The absence of any warnings issued by Newtown, from June through November 2005, and Newtown's unrebutted testimony that he was relieved of his authority to write up employees, is evidence that suggests that he was divested of the supervisory authority that he previously possessed. However, his disciplinary write-ups of Saumier and Covey, after such authority had purportedly been rescinded, calls that evidence into question. Newtown's testimony that he was ordered to write up Saumier and Covey may indicate a lack of supervisory status, but that testimony is without context or explanation. Clearly, Newtown was not involved in the ultimate discharge of Covey, though it occurred before he began his leave of absence. That Dunn initiated disciplinary action does not necessarily mean that Newtown did not have the authority to do so.[12] However, the non-involvement of Covey's direct supervisor in such a significant personnel action raises questions about whether Newtown currently possesses supervisory authority to discipline or discharge employees.

Authority to assign and responsibly direct the work of others.

A job description for the head custodian's position is in evidence.[13] The position is characterized as that of a "working supervisor." Among the "essential tasks" listed are:

- Directing work flow, evaluating employee performance on an ongoing basis, (and) assures coverage of all required work.

[11] The record reveals that there were at least five such warnings.
[12] Dunn did not testify at the hearing.
[13] There are no job descriptions in evidence for the custodian position, or the facilities manager position. The record reveals that a job description for custodian exists. A vacancy announcement for the facilities manager position is in evidence. It is not clear from the record whether there is a current job description for the position.

- Assures and provides comprehensive cleaning of all College buildings.
- Performs repair work as needed and assures prompt and effective repairs are completed by staff.
- Assures staff compliance with College policies and procedures.
- Has responsibility for proper set up and take down for all College special events.
- Leads and participates in snow removal including emergency call in and all grounds work.
- Assures College vehicles, equipment, shops are maintained to high standards of cleanliness and serviceability.
- Provides weekly inspection reports for all buildings.

There is a signature line for the holder of the position to acknowledge receipt of the document and understanding of its contents. Newtown did not sign the document that is in evidence. At the lower right-hand corner of the exhibit, it is noted that the job description was "Revised by Facilities Office 12/5/03." McFarland testified that no copy of a job description signed by Newtown could be located. Newtown testified that he saw the document for the first time several weeks before the hearing.

A vacancy announcement for the facilities manager position is also in evidence. The duties listed for the position include "Supervis(ing) activities of the Housekeeping Supervisor and all outside contractors." The document states that the facilities manager "manages the day to day maintenance of the buildings, grounds, equipment and plant facilities," but does not indicate that he supervises the day-to-day work of custodians.

A memorandum from McFarland to all faculty and staff, dated January 13, 2006, is also in evidence. This memorandum announced the appointment of Dunn as facilities manager, and stated that he would be "responsible for the direction of cleaning, maintenance, grounds, moving and event set-up services." Readers of the memorandum were informed that, instead of contacting McFarland, Newtown or administrative assistant Susan Streiff, as they had previously done, they could, instead, contact Dunn directly to expedite requests in these areas. This exhibit tends to support the Petitioner's argument that Newtown has been divested of supervisory authority, but the exhibit does not constitute conclusive evidence.

McFarland testified that routine building assignments take up approximately 75 percent of a custodian's time. When other needs arise, such as setting up events, moving offices or plowing snow, Newtown decides who the best person or persons for the job would be, and assigns these tasks. According to McFarland, Newtown spends about half his time performing the same work as custodians, and the other half on "supervisory functions." Newtown, however, testified that during his time as head custodian, he spent at most, 20 percent of his time performing supervisory functions, and that he now performs no supervisory functions at all.

Regarding the "essential tasks" listed on the head custodian job description, Newtown was not asked to testify specifically about what he does, or did, to "(direct) work flow." When asked what it meant to "assure staff compliance with College policies and procedures," Newtown testified: "That you wear your picture ID, you don't speed on campus, you use a time clock to punch in and out…" Newtown testified that in September 2005, McFarland posted a memo to the effect that Raymond Parent would assume responsibility for calling employees in and directing snow removal.[14] With regard to the remaining "essential tasks," Newtown testified that they are performed by all custodians. This assertion seems at odds with the plain language of the head custodian's job description.[15]

Newtown testified that two years before the hearing, he was told by McFarland not to inspect buildings any more, not to review time cards, and to clean his personal belongings out of a desk that he had been using. Newtown testified that it was formerly his practice to make out work assignments at that desk, but testified that he has not made any assignments since April 2005. Newtown testified that since facilities manager Dunn started in January 2006, he and the

[14] Parent is an employee in the Unit found appropriate herein.

[15] For example, the head custodian is charged, not only with performing repairs adequately and following College policies, but with making sure that "staff" do so as well.

custodians have received their assignments directly from Dunn. Newtown testified that between April 2005 and January 2006, McFarland made up daily and weekly assignments and posted them on a bulletin board. Neither party offered employee schedules, assignment slips or other such documents into evidence.

The disciplinary warnings issued by Newtown shed some light on his authority to assign and responsibly direct work. To a degree, they contradict his testimony that he did not assign work after April 2005. On its face, the June 30, 2005 warning to Kelly Baldwin resulted from her refusal to do work that Newtown had instructed her to do. However, Newtown testified that the employee expressed concern about performing this work to Newtown, that Newtown relayed her concern to McFarland, and that McFarland instructed Newtown to send her home if she refused to perform the work assignments. The warnings that Newtown issued to Saumier and Covey in November and December 2005 are not necessarily inconsistent with Newtown's testimony that he no longer made work assignments during that time period, as the documents do not reveal whether Newtown assigned them to the work they failed to adequately perform.

Authority to reward employees

The Employer's position is that Newtown's evaluation of employee performance determines the employees' eligibility for merit raises. The Petitioner argues that any role Newtown had in evaluating employees was limited, and that he has not made any recommendations regarding merit raises during the past 12 to 18 months.

McFarland testified that the responsibility to evaluate custodians' performance was conferred upon Newtown with his promotion in 2002, and that he continues to have this responsibility and the authority to carry it out. Five written evaluations performed by Newtown

are in evidence.[16] These contain ratings on a scale of 1 to 10, based on eight criteria.[17] The evaluations also include an overall rating of "superior," "acceptable" or "poor," and check spaces to indicate whether and to what degree the employees' performance has improved since the last evaluation. There are spaces for narrative answers to several questions. While most of the written comments are Newtown's, some are McFarland's. McFarland testified that in one case, his administrative assistant rewrote Newtown's comments, but only to make them neater; the substance of the comments was not changed. All but one of the evaluations in evidence are signed by Newtown as "supervisor." McFarland signed Newtown's name to one and initialed the signature. He explained that the evaluee happened by, and it was convenient to review the evaluation with him then and there. McFarland estimated that Newtown had performed a dozen such evaluations since 2002.

According to McFarland, to be eligible to receive a merit raise, a custodian's performance must receive an objective rating above five in each category.[18] The amount of an employee's merit raise is the product of a conversation between Newtown and McFarland, after Newtown has completed the evaluation. McFarland testified that he seeks Newtown's recommendation although he decides the amount of the raise, which may be from 25 cents to $1.00 per hour.

Newtown was not questioned about his role in evaluating employees, on direct or cross examination, by counsel for either party. The Hearing Officer examined Newtown, who acknowledged that he made the numerical ratings. However, Newtown also testified that if McFarland disagreed with the evaluation, he would give it back to Newtown to re-write it. With respect to raises, Newtown testified that he would suggest that an employee deserved a raise, but

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[16] These evaluations are two-page documents.

[17] Job understanding, quality of work, quantity of work, ability to learn new jobs, initiative and creativity, cooperation, judgment and common sense.

[18] There are also annual cost of living adjustments that are not tied to performance.

whether the employee received a raise, and the amount of any raise, was decided by McFarland. Newtown denied that there was any connection between his objective ratings and the amount of merit raises, and testified that he had not made a recommendation regarding raises in over a year.

On further cross-examination, however, Newtown agreed that he had rated employee Kevin Sansone highly in August 2005, and testified that he was not surprised that Sansone had received a raise. Newtown also testified that he would not have expected Sansone to receive a raise if his objective ratings had been at the lower end of the scale. Newtown similarly testified with respect to the raise received by employee Jesse McCaffery in June 2003.

A statutory supervisor exercises independent judgment in evaluating other employees, where the evaluations are the basis on which specific wage increases are awarded. Bayou Manor Health Center, 311 NLRB 955 (1993). In Bayou Manor, and in Cape Cod Nursing and Rehabilitation Center, 329 NLRB 233 (1999), cited by the Employer, the Board found that there was a direct correlation between the evaluations and the raises. I find that the evidence summarized above does not establish such a correlation in this case.

Although McFarland testified that an employee's overall rating must be above five (or 40 out of a possible 80) to qualify for a merit raise, Newtown denied that raises are tied to his objective ratings. In this regard, I note documentary evidence establishes that Jesse McCaffery, with ratings totaling 55 out of a possible 80, received a 25-cent raise in June 2003, while Luke Saumier, with ratings totaling 57, did not receive a raise in May 2005. Moreover, Newtown's unrebutted testimony that McFarland sometimes ordered him to rewrite evaluations, and that he has made no recommendations on raises for more than a year, weigh against a finding that Newtown currently possesses the supervisory authority reward, or to effectively recommend the reward of employees.

The burden of proving supervisory status is on the party asserting it. Kentucky River Community Care, Inc. v. NLRB, 532 U.S. 706 (2001). I find that the Employer has not carried its burden of proof as to this indicium.

Authority to hire, or to effectively recommend hiring.

McFarland testified that, of the nine employees hired in the facilities department since Newtown was promoted in February 2002, Newtown recommended eight of the nine.[19] According to McFarland, had Newtown recommended against any of the eight, they would not have been hired.

McFarland testified about the hiring process. First, McFarland advertises the position, then reviews the applicant pool with Newtown. The record does not reveal whether all applications were reviewed with Newtown, or solely those selected by McFarland to be interviewed. McFarland testified that Newtown generally conducts the initial interview, and if Newtown finds the applicant satisfactory, he and the applicant meet briefly with McFarland, and a starting date is determined. McFarland testified that two or three applicants had not been hired because Newtown recommended against them, but he did not name these applicants or specify the dates on which they had applied.[20]

Newtown's testimony contrasts starkly with McFarland's. Newtown testified that he has interviewed applicants, but always with McFarland present. He testified that he had never interviewed any candidate "on (his) own, ever," and that he has not interviewed anyone at all during the past two years. Newtown specifically denied having any involvement in the hiring of Hubert Tyler, in October 2005, or of Jorge Ocasio, in January 2006. The only hire that the Employer concedes Newtown was uninvolved in is that of Julien LaBarge, who was hired on

[19] Employer Exhibit 8 indicates that ten employees have been hired since February 2002.

[20] Newtown, on the other hand, did not rebut McFarland's testimony that Newtown had effectively recommended against hiring some candidates.

January 23, 2006. McFarland did not explain why Newtown had no involvement in LeBarge's hiring.[21]

Newtown acknowledged that in the past, he made recommendations for hire, based on his knowledge of an applicant or the applicant's family. He said that he was certain that there had been times when his recommendations were not followed. However, Newtown could not recall any names or specific dates.

McFarland's testimony and Newtown's could hardly be more contradictory. No employees or applicants testified. There is no documentary evidence in the record that bears, one way or the other, on Newtown's ability to effectively recommend hiring. On this record, I am unable to decide whether Newtown effectively recommends hiring.

Analysis

Section 2(11) of the Act defines a "supervisor" as:

> [A]ny individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

The statutory indicia outlined in Section 2(11) are listed in the disjunctive, and only one need exist to confer supervisory status on an individual. See, e.g., Phelps Community Medical Center, 295 NLRB 486, 489 (1989); Ohio River Co., 303 NLRB 696, 713 (1991); Opelika Foundry, 281 NLRB 897, 899 (1986); Groves Truck & Trailer, 281 NLRB 1194, n. 1 (1986). However, mere possession of one of the statutory indicia is not sufficient to confer statutory status unless such power is exercised with independent judgment and not in a routine or clerical manner. Hydro Conduit Corporation, 254 NLRB 433, 437 (1981).

[21] LeBarge was hired before Newtown began his current leave of absence. Dunn had been employed as facilities manager for approximately one week on the date LeBarge was hired. There is no evidence in the record as to whether or not Dunn was involved in the hiring of LeBarge.

Section 2(11) of the Act sets forth a three-part test for determining supervisory status. Employees are statutory supervisors if they hold the authority to engage in any 1 of the 12 listed supervisory functions; their "exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment;" and their authority is exercised "in the interest of the employer." NLRB v. Kentucky River Community Care, Inc., 532 U.S. 706 (2001).

The burden of proving supervisory status lies with the party asserting that such status exists. See Kentucky River, supra, 121 S.Ct. at 1866, 167 LRRM at 2167-2168; Michigan Masonic Home, 332 NLRB 1409, 1409 (2000). Lack of evidence is construed against the party asserting supervisory status. See Michigan Masonic Home, supra, at 1409. "Whenever the evidence is in conflict or otherwise inconclusive on particular indicia of supervisory authority, [the Board] will find that supervisory status has not been established, at least on the basis of those indicia." Phelps Community Medical Center, supra, at 490. Mere inferences or conclusionary statements without detailed, specific evidence of independent judgment are insufficient to establish supervisory authority. See Sears, Roebuck & Co., 304 NLRB 193 (1991).

Although the Employer has met its burden in part, and has established that Newtown once possessed and exercised supervisory authority, because he effectively recommended hires, assigned and directed employees' work and disciplined employees, there is insufficient evidence in the record to determine whether Newtown continues to possess and exercise such authority in these three statutory indicia relied on by the Employer.

Regarding the fourth indicia relied on by the Employer, the authority to reward employees (by means of evaluating their performance, and thereby affecting their merit wage increases), I have found that the evidence does not establish that Newtown's recommendations

determined the wage increases employees received. Thus, Newtown's performance evaluations do not establish that he exercised supervisory authority in this regard.

Based on the record evidence establishing that Newtown possessed and exercised supervisory authority and conflicting evidence of his continued exercise of such authority, I shall permit Newtown to vote in the election directed below, subject to challenge.

APPROPRIATE UNIT

The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time facilities department employees employed by the Employer at its Paul Smith's, New York campus, excluding office clerical employees, campus safety employees, Vice President Facilities and Lands, facilities managers, administrative assistants, utilities managers, guards and professional employees and supervisors as defined in the Act, and all other employees.

There are approximately 12 to 14 employees in the unit found appropriate herein.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate, as described above, at the time and place set forth in the notices of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the

commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by **United Food & Commercial Workers, District Union Local One.**

LIST OF VOTERS

In order to insure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to lists of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969); *North Macon Health Care Facility*, 315 NLRB 359 (1994). Accordingly, it is hereby directed that within 7 days of the date of this Decision, **2** copies of an election eligibility list, containing the full names and addresses of all eligible voters, shall be filed by the Employer with the Acting Regional Director of Region Three of the National Labor Relations Board who shall make the lists available to all parties to the election. In order to be timely filed, such lists must be received in the Albany Resident Office, Room 342, Leo W. O'Brien Federal Building, Clinton Avenue and North Pearl Street, Albany, New York 12207 on or before **March 22, 2006**. No extension of time to file the lists shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 Fourteenth Street, NW, Washington, DC 20570. This request must be received by the Board in Washington by **March 29, 2006**.

DATED at Buffalo, New York this **15th** day of **March, 2006.**

/s/Rhonda P. Aliouat
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